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No. [redacted]82

In the

Supreme Court of the United States

ERNESTINE C. SINISCAL and VERNIE REED, Administratrix of the estate of ELMER A. REED, deceased, *Petitioners*,

vs.

UNITED STATES OF AMERICA, as Trustee and Guardian and ex rel. of the Estates and Persons of Jasper Grant and Harold F. Thornton; HENRY B. TAYLOR and ELIZABETH A. TAYLOR, husband and wife; WILLIAM F. BRENNER and FRED M. MARSH, *Respondents*.

UNITED STATES OF AMERICA, as Trustee and Guardian and ex rel. of the Estates and Persons of Jasper Grant and Harold F. Thornton, *Respondents*,

vs.

ERNESTINE C. SINISCAL, ELMER A. REED, HENRY B. TAYLOR and ELIZABETH A. TAYLOR, husband and wife, and S. D. ALEXANDER, *Respondents*.

Petition for a Writ of Certiorari To the United States Court of Appeals For the Ninth Circuit

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DAILY JOURNAL OF COMMERCE

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The petitioners, Ernestine C. Siniscal and Vernie Reed as administratrix of the estate of Elmer A. Reed, deceased, respectfully pray this court that a writ of certiorari issue to review the decree of the U. S. Circuit Court of Appeals, Ninth Circuit, entered in the above

entitled case on November 14, 1953, and amended decree filed December 29, 1953, partly affirming and partly reversing the decree of the United States District Court of Oregon; however, it affirmd the U. S. District Court of Oregon on a question of law, that the relation of guardian and ward with the U. S. A. did not exist during the time Siniscal purchased the land from allottees, Grant and Thornton, and thereupon sold it to the Taylors, and refused to appoint a guardian ad litem for petitioners.

OPINIONS BELOW

The opinion in the U. S. District Court was rendered by Judge Gus Solomon, and on appeal to the U. S. Circuit Court of Appeals, Ninth Circuit, Judge Denman rendered the opinion, and it was filed on November 14, 1953, and as amended, was filed on December 29th, 1953, and is reported in Fed. Rep. 2nd Series, advance sheets, Vol. 208 on page 406. The Court held that the relation of guardian and ward to the U. S. A. was suspended during the period when Siniscal purchased the land from the allottees and sold it to the Taylors, and that they acted as individuals in their own right and not as incompetent Indians under guardianship.

STATUTE INVOLVED

The statute involved is Title 28 U.S.C.A. Rule 17 (c) Pg. 12, for the appointment of a guardian ad litem in case of incompetent parties to a suit.

> "Whenever an infant or incompetent person has a representative, such as a general guardian, committee, conservator, or other like fiduciary, the representative may sue or defend on behalf of the infant or incompetent person. If an infant or incompetent person does not have a duly appointed representative he may sue by his next friend or by a guardian ad litem. The court shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person."

The trial court did not make or enter any order in relation to the guardian ad litem appointment.

QUESTION PRESENTED

This petition is brought to review the following point of law.

Did the Court err, in deciding that the incompetent petitioners were not, at the time this sale was negotiated, under the relationship of guardian and ward and trustee, to the United States of America, and that Petitioners acted as individuals in their own right in this transaction, and not under the relationship of guardian and ward, and therefore, no guardian ad litem was

required for these petitioners in this case, notwithstanding, Congress had declared and established for many years past the relationship of guardian and ward by the U. S. A. over incompetent Indians, which has not been declared terminated or suspended by Congress, which has reserved to itself the sole power and authority to determine, why and when this guardianship shall be terminated or suspended. The courts have no jurisdiction to declare a temporary suspension of said guardianship at any time, place or under any circumstances.

SUMMARY OF FACTS INVOLVED

The facts are so intermingled that it becomes necessary to include material to make sense which ordinarily could have been omitted.

It will be observed that Indians are allottees of inherited interests, in land in S. W. Oregon. This land was allotted to respondents' ancestors, under the Act of February 8, 1887 (24 Stat. 388), amended by Act of February 28, 1891 (26 Stat. 795, U. S. C. 1946 Ed. Sec. 336), and known as Public Domain. All allottees are wholly emancipated from all Indian relations and connections with their Indian tribe. A trust patent had been issued by the U. S. to the original allottees for this allotted land, and these respondents, as their heirs, became allottees of inherited interests. However,

the U. S. Government restricted the trust title to allotted land which required that in case of sale of the land, only an Indian of the same tribe must first purchase it from the allottees by having the restrictions removed, and securing a fee patent from the Interior Department, and thereupon, it can be resold by this Indian buyer to anyone.

The fact is that the Bureau of Indian Affairs had not advised Siniscal at the time that a fee patent was required before she could sell the property, and instead the Bureau advised her that she could sell the land as soon as the restrictions were removed. The Taylors had been advised by the title company prior to the sale on August 10th, 1951, that it would not issue a title policy to the land until a fee patent had been secured by Siniscal, but these petitioners had no such knowledge or information, until the trial of this case. However, notwithstanding such knowledge by the Taylors, they had Siniscal deliver a deed of conveyance to them for this land and paid the appraised value of $135,000. (Pages 667, 668 and 676 of Tr.) That about 10 days thereafter, the Taylors had Siniscal apply for a fee patent through the Bureau, and the Bureau was advised by the Interior Department that a fee patent would be delivered in about three weeks, of which neither petitioners or their attorney had any knowledge or information, whatsoever, until at the time of the trial.

JURISDICTION AND REASONS WHY CERTIORARI SHOULD BE GRANTED

The decree of the Court of Appeals, Ninth Circuit, was filed on November 14, 1953. Petitioners filed their petition for rehearing, and the Court amended its decree, which was filed on December 29, 1953. The case is reported in Fed. Rep. 2nd Series, Adv. Sheets, Vol. 208, Pg. 406. Thereafter within ninety days thereof, as provided by Title 28, U. S. C. A. Sec. 2101, par. (c) the petitioners in due time filed their petition for an order extending the time to file petition for a writ of certiorari in this court to and including April 20, 1954, which was granted and filed in this court on March 25, 1954.

That on April 20, 1954, upon petitioner's motion for further extension of time to file petition in this Court, based on the death of Elmer A. Reed, one of the petitioners, this Court granted a further extension of time to file petition for writ of certiorari to and including May 20, 1954.

That Elmer A. Reed departed this life on April 13, 1954, and his widow, Vernie Reed, was thereupon duly appointed as administratrix of his estate by the Lincoln County, Oregon, Court, and she qualified as such, and a certified copy of her appointment as such administratrix was duly filed in the office of the clerk of this Court, and she was substituted as a petitioner in place and

stead of her deceased husband in this petition for writ of certiorari, and wherever the name of Elmer A. Reed appears herein, the administratrix Vernie Reed appears in his place and stead.

The jurisdiction of this court is invoked under Section 28 U. S. C. A., Sec. 1254 (1) as amended, to-wit:

"By writ of certiorari granted upon any petition of any party to any civil or criminal case before or after rendition of any judgment or decree," enacted pursuant to Art. III of the Constitution of the United States of America.

We claim that neither the U. S. District Court of Oregon, nor the U. S. Circuit Court of Appeals, Ninth Circuit acquired jurisdiction over these incompetent petitioners and the subject matter, without the appointment of a guardian ad litem over them as provided by Title 28, U. S. C. A. Rule 17 (c), page 12, while the respondents were represented by their alleged relationship as guardian and ward and trustee of the U. S. A., and as such, the guardian, U. S. A. acted adversely to the petitioners' interest and rights. The respondents had the right and authority to institute and prosecute this suit in their own individual rights and names. The relationship of guardian and ward between respondents and the U. S. A. was wholly terminated when the ancestors of respondents became allottees, and as such,

all their relation as guardian and ward to the U. S. A. was permanently terminated when they received a trust deed from the U. S. A. for their land, and upon their demise, the respondents, as their heirs, became allottees of inherited interests, and no relation of guardian and ward has ever existed between them and the U. S. A. except the U. S. A. held a restriction on this land. That when respondents sold this land to Siniscal, all that was required from allottees was their consent to sell and the removal of restrictions held by the Government on this land. The allottees have the exclusive and sole right and authority to sell their lands, subject only to the Interior Department issuing a fee patent. The Bureau appraised the timber and land and prepared and had Siniscal execute all documents for the purchase of the land. The law requires that this land must be sold by allottees to an Indian only, and he must be of the same tribe, all of which was complied with to that point.

This case arose when Siniscal sold and conveyed the land to the Taylors by deed on August 10, 1951, without first securing a fee patent from the Interior Department. Siniscal was advised by the Bureau that she could sell the land now and afterwards secure a fee patent to the land, and that this procedure had been followed by the Bureau in similar sales before and after this sale was consummated. The Bureau was in complete charge and

control of the sale of this land. On page 10 of appellants' reply brief on appeal to the Circuit Court of Appeals, the Attorney General by Mr. Morton states: "but it confirms the fact that they (Taylors) were the real purchasers and using Siniscal as a screen." On the same page, "it did not inform the Washington office of the fact that Siniscal was a mere tool employed by the Taylors." The Taylors were working with the Bureau officials in this sale.

I.

FACTS INVOLVED

We consider it necessary that the court at least be informed of an outline of the underlying facts.

This suit arises out of a sale of a tract of allotted timber land, approximately 750 acres in southwestern Oregon. The transcript of testimony is very lengthy and full of repetitions, until it is a mixed up mess. The only interest the petitioners, Siniscal and Reed, had in this sale was that Siniscal, of petitioners, acted as a go-between, between the allottees of inherited interests, Jasper Grant and Harold F. Thornton, and the purchasers of the land from Siniscal, Henry B. Taylor. The Indian Bureau in Portland, Oregon handled the whole transaction from the very beginning to the end, in-

cluding the appraisal and preparation of all documents for the sale and conveyance, except the deed from Siniscal to the Taylors, and had Siniscal execute them. Petitioners are enrolled Indians, born and still living on the Siletz Indian Reservation, in Lincoln County, Oregon, are incompetents and under guardianship of the U. S. A., and are citizens of the U. S. A. (Page 386, Tr.)

The Bureau advised Siniscal that she could convey the property to anyone as soon as the transaction was completed at the Bureau, and that she could secure a fee patent any time later on.

The law, however, requires that a sale of allotted Indian land must first be conveyed by the allottees to an Indian of the same tribe, and he in turn may thereupon sell and convey it to an Indian or non-Indian, provided however, that the seller to the Taylors shall first have secured a fee patent from Department of the Interior, after the restrictions have been removed.

Siniscal was in a delicate condition at that time, and she was accompanied to the Bureau by her father, Reed, which was all the interest he had in the sale. The Petitioners did not know the purchasers or the parties who handled or were interested in the sale, until on the day of the sale, August 10, 1951. Siniscal knew very little of the procedure she was required to follow in the sale and depended on the Bureau for instructions and

guidance. That her attorney had just been engaged and knew less than she did about the procedure at that time. It required about five minutes of time to close the deal at the Bureau, and the $135,000 was paid directly to the Bureau by the Taylors.

On March 12, 1952 the U. S. A. filed a complaint in the U. S. District Court of Oregon, as the representative and in the capacity as trustee and guardian ex rel. of the estates and persons of Jasper Grant and Harold F. Thornton, as incompetent Indian wards of the U. S. A., etc., and who were allottees of inherited interests. The complaint charged fraud and conspiracy against all of the defendants, including the petitioners, as to the appraisal and sale of the timber land. A trial was had, and a decree was made and entered against most all defendants accordingly, on fraud and conspiracy.

The U. S. District Court of Oregon refused to appoint a guardian ad litem, for the petitioners, and the U. S. Court of Appeals, Ninth Circuit confirmed it, and held that no guardian ad litem was necessary, as the petitioner Siniscal acted as an individual in her own right at the time of the sale and was not under the relationship of guardian and ward to the U. S. A. It will be observed that an Indian of the same tribe is required under the law, as a go-between, between the seller and the purchaser. There are other points involved in this

case which should have been appealed, but the financial situation of petitioners does not permit it.

The Taylors paid the consideration of $135,000 to the Bureau, which deducted its percentage for services, amounting to $1,400 or $1,500 and paid the balance to Grant and Thornton, who now have a suit pending in the state Court for an accounting, as they want the balance of their money. The respondents, the Taylors, also have a suit pending in the state court to recover the money paid to the Bureau for the purchased of the land involved.

We are aware that the petition for a writ of certiorari limits the petitioners to the sole question of whether or not the decree entered by the U. S. Court of Appeals, in relation to the appointment of a guardian ad litem for petitioners, however, at times it is often utterly impossible to make any sense by taking too short a cut.

The fact is, neither Siniscal or her father, Reed, ever knew enough about this whole transaction to comprehend it, and like most Indians, they go along when the government is the leader. The appointment of a proper guardian ad litem for these petitioners would have been a tremendous relief and help for them. What reason could be given by any court for refusing the appointment of a guardian ad litem, especially under the law and facts in this case. In my many years of practice in courts, I never heard a court refuse to appoint a guard-

ian at litem, especially where incompetency is established.

From the numerous inquiries from the profession and laity, it seems that all are perplexed about this ruling of the Indian guardianship.

The court could not and did not acquire jurisdiction over these incompetents and subject matter, until a guardian ad litem had been appointed and service of process had been served upon him and these incompetents, as it is required by the laws of Oregon in such cases.

After this case had been tried in the lower court, the government finally indicted the head of the Land Department in the Bureau, and his two cohorts, who had pled guilty and were sentenced to a fine and imprisonment. They all refused to testify in this civil case on the ground of self incrimination under the fifth amendment, U. S. Constitution. The Secretary was dismissed and the superintendent was removed, who had been aware that there was dishonesty going on in the Bureau for some time prior to the sale of this Indian land, but made no effort to stop it.

ARGUMENT AND BRIEF

The Act of February 8, 1887 and as amended March 3, 1901, 31 Stat. L. 1447 and May, 1906 Ch. 2348, 34

State. L. 182, granted full citizenship to Indians who had taken up an allotment, and who had taken up his residence reparate and apart from any Indian tribe with all rights and privileges and immunities. This establishes that Grant and Thornton were full citizens of the U. S. A. from the time of their birth, and upon their parents' death, they became allottees, of inherited interest. There never existed the relation of guardian and ward between Grant and Thornton and the U. S. A. at any time, and no court has the power or authority to declare otherwise.

Congress has the sole and exclusive power and authority to say when the relation of guardian and ward shall terminate or be suspended, and it is factual and not judicial, nor can the incompetents suspend it.

27 Amer. Jur. Pru., Section 46, pg. 571 and citations

U. S. vs. Ramsey, 70 L. Ed. 1039

U. S. vs. Waller, 61 L. Ed. 843

U. S. vs. Pelican, 58 L. Ed. 676

U. S. vs. Sandoval, 58 L. Ed. 107

Tiger vs. Western Inv. Co., 54 L. Ed. 195

Re: Heff, 49 L. Ed. 848

U. S. vs. Nice, 60 L. Ed. 1192, citizenship not affected.

When an incompetent is under guardianship, he must be served with process in a suit, and the statute provides that a guardian ad litem should be appointed by the court over incompetents, and process should thereupon also be served upon their guardian ad litem, as provided by state law, etc.

28 U. S. C. A. *Rule 17 (c), Infants or Incompetent Persons.*

We claim that the court under this statute, should have appointed a guardian ad litem for these petitioners, as soon as they moved for such an appointment, at the very beginning of the trial, but all motions were denied without comment.

It must be borne in mind that the U. S. A. was acting adversely to the interests of these incompetent Indians, and the court was duty bound under the circumstances to appoint a guardian ad litem for them. Indians generally are uninformed and only have a very limited knowledge of governmental procedure in Indian affairs, however they think they know, but they are of little help to an attorney in a law suit and especially in a case like this one.

Indians follow, but they seldom lead. They accept the U. S. A. as their supreme power and authority, which can do no wrong. This belief is due to the long

period of their relationship as guardian and ward, and that is their belief and practice since birth. They cannot comprehend why their guardian, U. S. A. is against them, after they did everything the Indian Bureau required of them, which represented the U. S. A., and they accepted it as being the only proper and legal thing to do.

The Secretary of the Interior apparently was unaware that the officials at the Indian Bureau had not been acting honestly in sales of Indian lands, and waited until it became public matter, and then it acted, and hence these petitioners were made defendants and finally were made the scapegoats. Is the Government entitled to take advantage of its own fraud?

Petitioners' attorney made several motions and arguments to have the court appoint a guardian ad litem for them, but while other motions and arguments were made at the same time and reported verbatim in the Tr., but for some unknown reasons, the motions of petitioners were left out of the record. See pages 80-81, 607-610. It recites Mr. Schmitt, attorney, was present at the Pre-Trial hearing, which is incorrect, and the fact is that he was not even given any notice of this hearing, nor did he have any knowledge or information thereof until three days thereafter, when he received a copy of the Pre-Trial Order from the U. S. District Attorney. We ask, why all this? The reporter was dismissed during the trial.

In *Winton vs. Amos et al.*, 65 L. Ed. 684 (pg. 688, Col. 1, & pg. 695 Col. 1), where incompetent Indians were defendants, the government appointed the governor guardian ad litem to serve process on, and the Attorney General to represent the guardian ad litem, and the Supreme Court held that to be sufficient.

In *Rule 17 (c), Title 28 F. R. C. P.* recites that the Court shall appoint a guardian ad litem for an incompetent person, not otherwise represented in an action, or shall make such other order, as it deems proper for protection of an incompetent person. No such order was ever made for these incompetents, and they were treated as though they were competents, while their guardian was acting adversely to them as well as the Bureau.

In *Zaro vs. Straus et al.*, U. S. Court of Appeals, 167 Fed. Rep. 2nd, 218, where an Indian woman was incompetent and had a former guardian in Ohio, and service of summons was made upon her personally in Florida, where she then resided, and an attorney thereupon represented her in court, but the court held that the service of process was insufficient to give the court jurisdiction, and inasmuch as she was incompetent, a guardian ad litem should have been appointed for defendant by the court, and service of the summons be made upon the guardian ad litem, in order to obtain jurisdiction over the incompetent, as provided by the laws of the State of Florida.

In the State of Oregon, where these incompetents are residents, the statute provides for personal service of summons upon both the guardian ad litem and his ward, in order to obtain jurisdiction, Sec. 1-605 O. C. L. A., which has been the law in that state for many years past. The U. S. Rule requires that service of the summons shall be made according to the Statute of the state wherein the incompetent resides, which was not pursued in this suit here, and the District Court never acquired jurisdiction over these incompetents and the subject matter.

In *Sandoval vs. Rosser*, 26 S. W. 950 (see p. 954) holds that a general guardian cannot appear for minors in a suit where he is adversely interested, and a guardian ad litem should have been appointed for the incompetents in order to obtain jurisdiction.

Also *Kidd vs. Prince*, 182 S. W. pgs. 725-729-731 (Tex.) holds that notwithstanding there was no statute or law on the subject forbidding or permitting it, and it is therefore void, unless a guardian ad litem is appointed for the incompetents whose interests are not adverse, even though the process was regularly served as natural guardians.

In *Wessel et al vs. U. S. F. & G. Co.*, 158 Fed. 2nd, 20, the court discusses the legal phase of Title 28 U. S. C. A. Rule 17, (c), however the situation, conditions, and cir-

cumstances, readily differentiates it from the case at Bar, in this: That these petitioners were under guardianship of the U. S. A. ever since their birth, and the Congress is the only one which can terminate or suspend it. The Courts have no authority or power whatsoever to interfere with this guardianship in any respect. That the government was acting adversely to the interests and welfare of these petitioners. When the Court declined and refused to appoint a guardian ad litem for petitioners, it left them still under the guardianship of the government. The government by its agents, instead of protecting its wards, led and directed them in the sale of this land, and then prosecuted them after they had followed and pursued the orders and directions of the government's officials, who then tied their hands, so that they were helpless, and then charged them with conspiracy and fraud in the sale of this land to cover up their own sins. Rule 17, (c) recites, "not otherwise represented," does not have reference to petitioners' attorney, otherwise a guardian ad litem would seldom be appointed. The U. S. District Court at no time gave any reason why it refused to appoint a guardian ad litem, which left petitioners' attorney helpless.

It is clearly evident that there was a purpose by the respondents in coming into court as guardian and ward of the U. S. A. in this, that it gave them the sup-

port of the U. S. A. throughout the trial and thereby secured control of the case and together with the government's investigation department, and the Bureau to bolster up their case and thereby the petitioners were severely handicapped throughout the trial, as they had no help whatsoever, and all doors to any information had been closed and sealed by the U. S. A., as such guardian, while on the other hand petitioners are ignorant, helpless, and do not even know or understand or comprehend why they are charged with fraud, etc., while the Bureau handled the whole transaction.

It was the duty of the U. S. District Attorney to represent these incompetent wards in all suits at law and equity, and he should have demanded the appointment of a guardian ad litem for these incompetents instead of resisting it.

25 U. S. C. A. Ch. 5, Sec. 175.

These respondents should have acted in their own right in this case, as plaintiffs, without being represented by the U. S. A. on the relationship of guardian and ward, which does not now or has ever existed between them and the U. S. A., and they are allottees of inherited interests, and hence, are not now or ever were incompetents.

The $135,000 was paid to the Bureau upon the alleged sale of this land, and it retained around $1,400 to $1,500 for its services, and the balance of it was paid directly to allottees. What kind of guardianship is this?

We respectfully submit that the U. S. Court of Appeals erred in confirming the decree of the U. S. District Court in this, that the petitioners were not entitled to a guardian ad litem, while on the other hand the respondents were represented by the U. S. A. We contend that in view of these errors, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Louis E. Schmitt,

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Of Attorneys for Petitioners.

John C. Veatch,
Of Counsel